Filed 4/23/19 P. v. Lopez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RENE LOPEZ LOPEZ, Defendant and Appellant.	F074765 (Super. Ct. No. F13910925) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez, Nora S. Weyl and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Rene Lopez Lopez sexually abused his daughter, identified herein as Jane Doe (Doe), between 2009 and 2013, during which time she was between the ages of 16 and 20 years old. He was charged with and convicted by jury of 185 counts of rape by means of force, violence, duress, menace or fear, in violation of Penal Code section 261, subdivision (a)(2),[1] and one count of oral copulation by means of force, violence, duress, menace or fear, in violation of former section 288a, subdivision (c)(2)(A).[2] As to counts 1 through 22, the jury found true that Doe was a minor 14 years of age or older. (§ 264, subd. (c)(2).) The trial court sentenced defendant to a total determinate term of 1,503 years in prison as follows: full, separate, and consecutive upper terms of eight years each on counts 1 through 17, and 23 through 186; and full, separate, and consecutive upper terms of 11 years each on counts 18 through 22.[3] (§ 667.6, subd. (d).)

On appeal, defendant claims that he is entitled to reversal of six rape convictions because as to six of the seven acts of sexual intercourse during which Doe was drugged, the evidence is insufficient to show that he committed rape by means of force, violence, duress, menace or fear.[4] He also claims that the trial court erred when it failed to instruct the jury on unanimity with respect to counts 29 through 184; erred when it directed the jury to the unanimity instruction in response to its question during deliberations regarding

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 Effective January 1, 2019, section 288a was renumbered to section 287. (Sen. Bill No. 1494 (2017-2018 Reg. Sess.) ch. 423, § 49.)

3 On counts 18 through 22, defendant was sentenced pursuant to section 264, subdivision (c)(2), which provides for a sentencing triad of 7, 9 or 11 years for the commission of forcible rape against a minor 14 years of age or older. Because the amendment to section 264, adding subdivision (c), was effective September 9, 2010, its application was limited to those qualifying offenses that occurred after its enactment. (Assem. Bill No. 1844 (2009-2010 Reg. Sess.) ch. 219, § 4.)

4 Defendant initially sought reversal of seven convictions but conceded in his reply brief that as to the first incident involving the drugs, there is sufficient evidence of duress.

count 186 (oral copulation); and erred when it limited his cross-examination of Doe on her immigration status, in violation of the confrontation clause of the Sixth Amendment. Finally, defendant claims his sentence constitutes cruel and/or unusual punishment under the state and federal Constitutions. In supplemental briefing, defendant concedes he forfeited his confrontation clause claim by failing to object and he advances a claim of ineffective assistance of counsel.

The People dispute defendant's entitlement to any relief on his claims and as to his confrontation clause and cruel and/or unusual punishment claims, they raise the forfeiture doctrine.

We conclude that defendant's claims lack merit and affirm the judgment.

FACTUAL SUMMARY

I. Prosecution Case

A. Sexual Assaults

Defendant brought Doe to the United States from Mexico in 2006. Doe moved in with defendant, his wife, and their child while Doe's mother and siblings remained in Mexico. In 2008, defendant and his wife separated, and she and their child moved out while defendant and Doe remained in the apartment.

In early 2009, one of defendant's friends, who was interested in more than a friendship with Doe, raped her after she rebuffed his advances.[5] Sometime later, she told defendant what happened. She testified he was surprised and angry, and he told her she had two choices: report it or he would take matters into his own hands. She reported the rape to the Fresno County Sheriff's Department in 2009 but without any information

[5] Doe testified that the acts of rape committed first by defendant's friend and then by defendant all involved nonconsensual sexual intercourse and she described the acts. (§ 261, subd. (a).) Under these circumstances, it is unnecessary to summarize the specific details.

beyond the man's name and approximate age, the department was unable to identify the suspect and the case was not prosecuted.[6]

Several weeks after reporting the crime, Doe, who was then 16 years old, was in her room doing homework on her bed when defendant entered the room and began caressing her breast over her clothing. Frightened, she told him to take his hand away and when he did not do so, she began to cry. Doe testified that defendant told her she needed to prove what happened with his friend, and stated "he didn't believe what had happened, and he had to do it on his own." She testified he also stated that "[i]f [she] was already damaged, why couldn't he do this."

Defendant took Doe's shorts and underwear off. She cried harder and said no, but he put his hand over her mouth and raped her for several minutes. She tried to push defendant off by grabbing his shoulders and she moved around, but he did not stop. After he "finished," he moved off of her and, without saying a word, sat down in a chair for a few minutes before leaving the room. Doe testified she was in shock and just cried.

The next day, defendant told Doe he wanted to have sex with her. She said no and told him that it was not right, but he said he was going to have sex with her and he would stop sending money to her mother and siblings in Mexico if she refused. He came over to her and tried to kiss her but she moved her head. He told her she had to have "relations" with him and she again said no. He grabbed her waist and tried to caress her neck. She pushed him away and he struggled to take her clothes off while she struggled to keep them on. He succeeded in pulling her pants down and began raping her. She said no again and tried to push him off, but he laughed and told her she probably already liked it. She said no and told him she did not have any reason to like it because he was her father. Defendant continued to have intercourse with Doe for several minutes and then

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6 Doe testified to one rape, while Deputy Villanueva testified that in May 2009, Doe reported she had been raped twice by defendant's friend: once in February 2009 and again in March 2009.

ejaculated on her leg. Doe cleaned herself and defendant informed her "this was going to continue."

On the third occasion, defendant informed Doe he was in the mood to have sex with her. When she said no, he told her she had to say yes because she now belonged to him and "this is the way it's always going to be." Doe was in shock. Defendant told her to lie down on the bed and she said no. He told her a second time to lie down. She testified he looked angry and told her if she did not comply, he was not going to send money to her mother and siblings. Doe laid on the bed and defendant told her to take her pants off. She moved her pants below her knees and defendant then raped her. She started to cry and defendant laughed. She continued to cry and asked him why. He told her everything was her fault and none of this would have happened if the first man had not touched her. At the end, defendant again ejaculated on her leg and she cleaned herself.

On the fourth occasion, defendant was drinking beer in the living room and Doe was doing homework in her room. Defendant went to the bedroom, said he was using drugs and told Doe she had to use them as well. He then directed her to take the drug, which he did not identify. She said no. Defendant repeated she had to take it and instructed her on how to do so. Doe testified she took the drug, which looked like "crystal," because he looked angry, he was speaking loudly, and "[e]ither way … [she] was going to have to have sex with him."

Defendant told Doe the drug was going to make her feel differently and she testified it did; she said felt sleepy and then she began to talk. She also felt calm. Defendant started caressing her breast and she tried to get his hand away but was not successful. He asked her how she felt, and she responded she felt fine. Defendant started kissing Doe in and on her mouth, and she testified she let him because "[her] body felt different." Defendant told Doe he was in the mood to have sex with her but she told him no. He then asked, "[I]sn't it that you feel like having sex with me like I do?" She again

said no and he responded, "[F]or sure you do want to do it, but you just don't want to do it." Doe testified that because of the drug and defendant touching her, her body starting desiring sex. Defendant told Doe to take her clothes off and she complied. He then had sexual intercourse with her. She said, "In my mind I was saying no, but since I had the drugs, my body was responding differently." They had sex for approximately five minutes and he finished by ejaculating on her leg.

Doe testified that approximately six or seven times, defendant gave her drugs before having sex with her. Each time, she told him she did not want to take the drugs and he told her she had to do so. On those occasions, the drugs caused her to desire sex with defendant and she communicated that desire. She testified that she felt bad afterward because he was her father and it was not right.

After those six or seven incidents, defendant and Doe moved from an apartment to a house and he stopped using drugs, but he continued to have sex with her two or three times a week.[7] She testified that prior to moving, he would have sex with her one or two times a day.

Doe stated that defendant had sex with her between 2009 and 2013, but many years had passed and it hurt to remember.[8] She testified that other than the six or seven occasions he gave her drugs, she told him she did not want to have sex with him and physically resisted him. Two or three times he listened and told her that was fine, but, otherwise, he did not listen to her. She testified he would get mad at her and tell her he was not going to buy the things she needed to go to school, he would hold her down, and he also told her she "wasn't worth being a person."

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7 On cross-examination, Doe testified that defendant continued using drugs after the move in 2010, but he did not force her to use them.

8 The case went to trial more than three years after the last rape occurred.

Doe testified that on one occasion in 2010, defendant told her he wanted to have oral sex and she told him no. He repeated he wanted to have oral sex and told her to kneel down. She complied because he looked angry and he took off his pants. Defendant ordered Doe to perform oral sex and she again told him she did not want to. He told her to do so in "a very strong voice." She started to cry but "put [her] mouth on his penis."

In March 2011, Doe realized defendant had impregnated her. When she told him, he started laughing and said, "[D]idn't you realize that I had cum inside you?" Doe informed defendant she was not going to have the baby and, on her 18th birthday, defendant took her a clinic and paid for medication to terminate the pregnancy.

Doe testified that sometime after the abortion, she began using a notebook to record her menstrual cycles and the days defendant forced her to have sex with him. She explained to the jury that she noted each date shortly after the rape occurred, once defendant left, and that each date she had written down in the notebook reflected nonconsensual sex. She testified that each time he would say he was in the mood for sex and she would say no, but he would not listen. She testified he would ask why and she told him she was not comfortable with it, but he said she belonged to him and had to do whatever he told her to.

The last rape occurred in June 2013, when Doe was 20 years old. Doe had met a man approximately six months earlier and was meeting up with him without defendant's knowledge. One day while she and defendant were at her uncle's house, defendant confronted her while he was drunk and she told him about the man she was seeing. Defendant became angry, asked why she was sneaking out with the man, and wanted to know how someone could "take over something that belonged to him."

Once they returned home, defendant scolded her and asked for an explanation. After Doe told him that he had damaged her, he demanded she dial the man's phone number. She did and then passed the phone to him. Defendant confronted the man over the phone and then subsequently demanded three times that Doe call the man back. After

she refused, he took off his belt and hit her in the leg, leaving a big bruise. Doe cried and told him "never again are you coming close."

Doe testified that a few minutes later, defendant asked for forgiveness and told her it was her fault. She said that he came close to her and she could feel and see from his anger that "he wanted to abuse [her] again …." Defendant told Doe "he was going to abuse [her] again," and she said no and moved away from him. Doe told defendant not to touch her, but he pushed her on the bed and tried to take her clothes off. After a struggle, he succeeded in getting her clothes off and he raped her as she cried. After several minutes, defendant ejaculated on her leg and then went to his bed. She remained on her bed crying.

Doe had worked for H.M. since 2012 cleaning houses and a few days after the last rape, Doe moved in with her. H.M. testified that Doe appeared scared when she received phone calls from her father and H.M. heard messages he left for Doe, during which he said "a lot of ugly things." Defendant also left messages for Doe saying he loved her and, at one point, defendant sent Doe a love song about forgiveness and change, which H.M. listened to with Doe. Doe and H.M. both testified that the song was inappropriate for a father-daughter relationship and, based on the inappropriateness, H.M. questioned Doe about it. Doe began to cry and told H.M. that defendant had been sexually abusing her and that he had impregnated her. Doe subsequently reported the sexual assaults to the Fresno Police Department.

B. Pretextual Calls

Detectives arranged for Doe to make two pretextual phone calls to defendant. Detective Xiong testified that the second call was arranged due to the poor quality of the first call. Defendant's responses to many of Doe's questions were vague and indirect, but when she brought up what he "did" to her during the first call, he responded that she "agreed to it." Defendant denied he threatened to stop sending money to Doe's mother and, while he acknowledged that it was not okay to have sex with his daughter, he again

said she "agreed to it." He also stated, "I would ask you and you wouldn't say anything," and, "You allowed me." Doe denied agreeing and defendant responded, "What's done is done and it will remain like that." Toward the end of the first call, defendant said he was wrong, "but it is something that involves two and, like I said, that's why I asked you if you were okay with it and you said yes, yes and you never told me anything."

During the second call, defendant again stated that Doe "agreed" and he again denied threatening her. When Doe brought up the abortion, defendant said that was an accident and he later asked, "[H]ow many times do you want me to apologize to you?"

C. Statement to Police

In November 2013, after the pretextual phone calls, defendant went to the police department at Detective Xiong's request and was interviewed for approximately 50 minutes. The interview was recorded on video, but after the interview was over, Xiong discovered that only the first 30 minutes, approximately, were recorded. He explained on cross-examination that the recording equipment is in another room and, therefore, the issue was not discovered until afterward.

Defendant described his relationship with Doe as a normal father and daughter relationship and he initially denied having sex with her. He later stated he was drinking and using drugs during that time and was not aware of what was happening while he was asleep. He denied giving Doe drugs, but he said that "maybe" Doe touched him sometimes. In response to Xiong's questions, defendant acknowledged that Doe touched his penis until it became hard, but he stated that he did not know why and that he told her to stop because it was not right. Defendant denied he ever touched Doe and said that she was 14 or 15 years old at the time this happened.

The last question Xiong asked defendant before the recording stopped was why defendant thought Doe would come close and touch him. Xiong testified that defendant said Doe wanted to have sex with him, and she took their clothes off and got on top of him. Defendant denied holding Doe by the arms while they were having sex, denied

being on top of her except for once, and denied he threatened not to send money to Doe's mother and siblings. Defendant stated he was drinking heavily at the time and using "crystal." Defendant admitted he had sex with Doe two to three times a week from 2009 to 2013, but said it was always Doe's idea. Defendant also said he told Doe to stop and that it was not a good idea, but he did not respond when Xiong asked him why he did not just push Doe away or move away from her. Xiong testified that defendant admitted he took Doe to the clinic to get an abortion, but he did not say that he was the father.

II. Defense Case

A. R.L.'s Testimony

Defendant's two sisters, R.L. and S.L., testified on his behalf. R.L. testified that she, her husband and two children moved to Fresno in February 2008 and lived with defendant and Doe in their two-bedroom apartment until moving out that August.[9] R.L. said defendant and Doe also moved out of the apartment a few days later and went to live with Doe's aunt, uncle and cousins in their house.

R.L. testified that when she and her family lived with defendant and Doe, they shared the bedroom that had been Doe's and Doe shared defendant's bedroom with him. R.L. first stated that defendant "sometimes" slept in the living room and later stated that he almost always slept in the living room. R.L. said she was home most of the time and never saw anything inappropriate. She described defendant and Doe's relationship as "calm, fine."

On cross-examination, R.L. testified that she was not aware defendant had admitted to having sex with Doe and she agreed that a father should not have sex with his daughter.

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9 R.L. first testified that they moved to Fresno in February 2008. She then said it could have been in 2009. In addition, after first testifying Doe was 18 years old, she then said that Doe, who was born in 1993, turned 15 that year. As Doe was born in 1993, she turned 15 in 2008.

B. S.L.'s Testimony

S.L. testified that in July 2010, defendant and Doe moved into the one-bedroom duplex she shared with her husband and their two children. Defendant and Doe lived there for approximately eight months and slept in the living room. S.L. said that Doe was rude to her father, but never expressed any fear of him, and S.L. did not see or hear any sexual abuse. S.L. testified that Doe moved out at one point for approximately two months and after defendant rented an apartment across from R.L., Doe moved in with him. S.L did not work outside the home and stated she never saw or heard any sexual abuse occurring.

On cross-examination, S.L. said that she was not aware defendant admitted to having sex with Doe, but it would not change her opinion.

DISCUSSION

I. Absence of Unanimity Instruction on Counts 29 through 184

A. Background

We turn first to defendant's claim that the trial court erred when it failed to give the jury a unanimity instruction for counts 29 through 184. In counts 1 through 28 and count 185, defendant was charged with committing rape by means of force, violence, duress, menace or fear during specific one or two month time periods in 2009, 2010, 2011 and 2013. In count 186, defendant was charged with oral copulation by means of force, violence, duress, menace or fear during a nine and one-half month period in 2011. As to those 30 counts, the trial court instructed the jury on unanimity pursuant to CALCRIM No. 3501, as follows: "The People have presented evidence of more than one act. To prove that the defendant committed these offenses in each count, you must not find the defendant guilty unless: [¶] One, you all agree that the People have proved that the defendant committed at least one of these acts in each count, and you all agree on which act he committed for each offense; [¶] [o]r, you all agree that the People have

proved that the defendant committed all of the acts alleged to have occurred during the time period charged in each count."[10]

In counts 29 through 184, however, defendant was charged with committing rape by means of force, violence, duress, menace or fear on or about specific dates in 2011 and 2012. These counts were tied to dates Doe recorded in her notebook. On appeal, defendant claims that the trial court erred when it failed to instruct the jury on unanimity as to these counts.

In response, the People point out that counts 29 through 184 relate to specific acts of rape that occurred on specific dates and do not involve generic testimony from which the jury would be unable to distinguish between acts. In addition, they assert that no unanimity instruction was required because the prosecutor made an election.

In reply, defendant disputes that the prosecutor made an election in this case and he cites *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539 for the proposition that "[i]f the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction."

B. Analysis

"In a criminal case, a jury verdict must be unanimous" and "the jury must agree unanimously the defendant is guilty of a *specific* crime." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 877–878.) "Therefore, cases have long held that *when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the*

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10 The trial court gave the modified unanimity instruction in accordance with *People v. Jones*, which explained, "[W]hen there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*People v. Jones* (1990) 51 Cal.3d 294, 322; accord, *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555–556.)

jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (*People v. Russo*, *supra*, at p. 1132, italics added; accord, *People v. Covarrubias*, *supra*, at p. 878; *People v. Brown* (2017) 11 Cal.App.5th 332, 341.) "'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.'" (*People v. Russo*, *supra*, at p. 1132.)

In this case, Doe kept a notebook in which she recorded dates that defendant raped her. On the few occasions defendant raped her more than once on a particular day, she recorded that as well. Thus, each date in Doe's notebook corresponded with a rape and, as evidenced by testimony and the notebook, each of counts 29 through 184 was tied to one act of rape that occurred on or about the specific date alleged. Because the jury was not confronted with more than one discrete crime per count, there was no need for either a unanimity instruction or a prosecutorial election during argument. (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132 [where the prosecutor makes an election by tying specific counts to specific criminal acts, no unanimity instruction is required]; *People v. Brown*, *supra*, 11 Cal.App.5th at p. 341 ["The prosecution can make an election by 'tying each specific count to specific criminal acts elicited from the victims' testimony'—typically in opening statement and/or closing argument."].) That is, there was no "'danger that the defendant [was] convicted even though there [was] no single offense which all the jurors agree the defendant committed.'" (*People v. Russo*, *supra*, at p. 1132.) The jury would either believe or disbelieve that defendant committed an act of rape against Doe on or about the date alleged in each of counts 29 through 184, and its verdicts demonstrate it believed her testimony.

Defendant contends that a unanimity instruction was required because there were more rapes recorded in the notebook than discrete events charged in the information and the jury was instructed that the People need only prove the rape happened reasonably close to the date charged. While there are, as defendant observes, more dates in the notebook than counts charged, the fact that the prosecutor could have but did not charge additional rapes based on the notebook dates is of no moment. It remains that in counts 29 through 184, defendant is charged with one act of rape on a specific date, and none of these dates charged overlap with the time periods charged in counts 1 through 28 and 185. Thus, as to counts 29 through 184, the jury in this case was not confronted with a situation in which it risked convicting defendant "'on a single count … based on two or more discrete criminal events'" (*People v. Russo*, *supra*, 25 Cal.4th at p. 1135; accord, *People v. Brown*, *supra*, 11 Cal.App.5th at p. 341), and no unanimity instruction was required. Having found no instructional error, we do not reach the parties' remaining arguments relating to prejudice.

II. Substantial Evidence Challenge to Six Rape Counts

A. Background

Defendant was convicted of 185 counts of rape. Doe described six or seven occasions in which defendant made her take drugs prior to having sexual intercourse with her. After taking the drugs, Doe had the physical urge to have sex with defendant and communicated that desire. Without citation to any authority other than for the general proposition that a criminal conviction must be supported by substantial evidence, discussed below, defendant claims that on six of those seven occasions, the jury's verdict is unsupported by substantial evidence of rape by means of force, violence, duress, menace or fear.[11]

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11 As previously noted, in his opening brief, defendant challenged seven convictions but in his reply brief, he concedes that the first time he made Doe take the drugs, which was the fourth rape recounted by Doe in her testimony, there is substantial evidence of rape through duress.

The People argue defendant has not shown that the rape charges were based on the incidents where Doe was drugged or that the prosecutor relied on those incidents to prove the charges. Alternatively, they argue that defendant's act of forcibly drugging Doe to facilitate the rapes constituted substantial evidence of duress and fear.

B. Standard of Review

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense" (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio, supra*, at p. 357.)

"In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio, supra,* 43 Cal.4th at p. 357.) "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt ….'" (*People v. Nguyen, supra,* 61 Cal.4th at pp. 1055–1056.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio, supra*, at p. 357.) However, "speculation, supposition and suspicion are patently insufficient to support an inference of fact." (*People v. Franklin*

(2016) 248 Cal.App.4th 938, 951; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

C. Analysis

As discussed in the preceding section, in counts 1 through 28 and 185, defendant was charged with committing rape during specific time periods in 2009, 2010, 2011 and 2013. Because the evidence suggested more than one discrete crime per count, either a unanimity instruction or a prosecutorial election was required (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132; *People v. Brown*, *supra*, 11 Cal.App.5th at p. 341) and, here, the trial court instructed the jury on unanimity as to those counts.[12] Defendant does not argue that the jury was instructed or otherwise relied on a legally invalid theory of criminal liability.[13] Rather, we interpret defendant's argument as intimating the jury may have relied on a factually invalid theory, although the matter is not entirely clear and he does not cite to any supporting authority that illuminates the matter. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1126–1128.)

Other than the six occasions where drugs were employed, defendant does not claim his convictions are unsupported by substantial evidence nor would such an argument have merit. The evidence shows that except for those six incidents, when Doe said no to defendant's sexual advances, he threatened to stop sending money to her

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12 As already discussed, in counts 29 through 184, defendant was charged with committing rape on or about specific dates in 2011 and 2012 that correlated with dates Doe wrote in a notebook. Doe testified that use of the drugs stopped in early 2010 and that each of the dates recorded represented days defendant forced her to have sexual intercourse with him after she said no. This necessarily limits defendant's substantial evidence challenge to counts 1 through 28 and 185.

13 In his reply brief, defendant faults the People for failing to cite to any authority for their argument that he failed to show his conviction rested on the incidents involving the drugs. Defendant's arguments also suffer from this same deficiency and, as the moving party, it is he who bears the burden of showing error on appeal. Any argument that the jury was presented with a legally invalid theory is waived by virtue of failing to brief the issue and cite to applicable authority. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363–364; accord, *People v. Hovarter* (2008) 44 Cal.4th 983, 1029.)

mother and siblings, threatened to stop buying things she needed for school, held her down, removed her clothing as she struggled to prevent him from doing so, and expressed anger toward her. "'[T]he judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error.'" (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 227, quoting *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) As we have stated, a reversal for insufficient evidence "'is unwarranted unless it appears "that upon *no hypothesis whatever* is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357, italics added, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"When 'there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground.'" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 278, quoting *People v. Guiton, supra*, 4 Cal.4th at p. 1127; cf. *People v. Chiu* (2014) 59 Cal.4th 155, 167 ["When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground."].) This rule flows from the recognition that "analyzing evidence, and determining the facts, are functions peculiarly within the expertise of juries. Although appellate courts review the sufficiency of the evidence supporting verdicts, such review is narrowly prescribed." (*People v. Guiton*, *supra*, at p. 1126.) "[W]hen an appellate court determines that the evidence was insufficient, it has concluded that no 'reasonable' trier of fact could have found the defendant guilty. When this occurs, an appellate court, or the trial court in the first instance, must intervene. In analyzing the prejudicial effect of error, however, an appellate court does not *assume* an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise." (*Id.* at pp. 1126–1127.)

Here, the record does not indicate otherwise. Doe testified that between 2009 and June 2013, defendant raped her one to two times per day at first and then two to three times per week. Detective Xiong also testified that defendant admitted he had sex with Doe two to three times a week between 2009 and 2013. Although the unanimity instruction obviated the need for a prosecutorial election as to the specific act relied upon (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132; *People v. Brown*, *supra*, 11 Cal.App.5th at p. 341), during closing argument, the prosecutor focused on the evidence that defendant raped Doe twice a week despite her telling him no *except* on the six or seven occasions he drugged her (see *People v. Brown*, *supra*, at pp. 341–342). While defendant asserts that the prosecutor argued he was guilty of rape by means of force, violence, duress, menace or fear on those occasions he gave her drugs, the record does not bear this out. Defendant relies on the following excerpt for support: "But those times that she didn't physically resist, that doesn't equal consent." In full context, however, the prosecutor argued:

> "[S]he would tell him no but with the exception of a few times. He would be insistent on the fact that he wants to have sex with her. She would still tell him no. She would try to keep her clothing on. And some of the times, she did physically resist. But those times that she didn't physically resist, that doesn't equal consent. That doesn't mean that she would act freely and voluntarily because he would threaten her with not sending money to her family. He would pray on that guilt that she would feel if her family didn't receive financial support, that it would be her fault. He would use whatever he could to get what he wanted, and what he wanted was to have sex with her."

We are unpersuaded by defendant's bare argument that in convicting him of 185 counts of rape, the jury relied on the six incidents where drugs were employed. Defendant is not entitled to a presumption that the jury relied on an unreasonable factual theory in convicting him and we find no indication in the record that it did so. (*People v. Ghobrial*, *supra*, 5 Cal.5th at pp. 277–278, quoting *People v. Guiton*, *supra*, 4 Cal.4th at

pp. 1126–1127.) Accordingly, we reject defendant's claim that he is entitled to reversal on six of his 185 rape convictions.[14]

III. Instruction to Jury During Deliberations

A. Background

In count 186, defendant was charged with oral copulation by means of force, violence, duress, menace or fear sometime between March 16, 2011, and December 31, 2011. Doe testified to one act of forced oral copulation that occurred in 2010.

During deliberations, the jury sent the court a note with the following question: "We would like to ask the Judge what we should do if we agree that the act occurred, but not within the date range stated in the count. Specifically, the range of the oral copulation in the count does not match the testimony read to us by the court reporter." The court read the question for the record and stated, "[B]ased on our [discussion in] chambers, what I propose … is [to] send the following response back to the jury attached to their request form reading as follows: Please refer to instruction Number 3501 at pages 40 through 42. Please advise if any further questions. Please save this note. So that's the response that I believe was agreed to in chambers and that's what I proposed to do unless we decide otherwise …." The parties agreed, and the response was delivered to the jury room.

Defendant now claims the trial court erred in referring the jury to the unanimity instruction, which applies to multiple acts rather than a single act, and the court should have, if anything, referred the jury to CALCRIM No. 207, pursuant to which the jury was instructed, "The People are not required to prove that the crime took place exactly on the

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[14] Given our rejection of defendant's claim on this ground, we do not reach the People's alternate argument that facilitating rape through the use of drugs constitutes rape by means of force, violence, duress, menace or fear, but we observe that a separate subdivision of the statute under which defendant was convicted addresses rape "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused." (§ 261, subd. (a)(3).)

date alleged, but only that it happened reasonably close to that day." Defendant claims the error deprived him of his federal and state constitutional rights to a fair trial by an impartial jury because it constituted instruction to the jury on an invalid legal theory upon which the jury may have based its verdict.

B. Standard of Review

Section 1138 provides that "[a]fter the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." The statute "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

"The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) However, the court "must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Ibid.*; see *People v. Thompkins* (1987) 195 Cal.App.3d 244, 253 ["[B]oth jurors and the justice system will be well served in the vast majority of cases if the trial judge thoughtfully considers the jury's inquiry, clarifies it if necessary, studies the applicable legal principles, and responds to the jury in as simple and direct a manner as possible."].)

We review for abuse of discretion "any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury." (*People v. Waidla* (2000) 22 Cal.4th 690, 745–746; accord, *People v. Fleming* (2018) 27 Cal.App.5th 754, 765; *People v. Franklin* (2018) 21 Cal.App.5th 881, 887.) However, "[w]e review de novo the legal accuracy of any supplemental instructions provided." (*People v. Franklin*, *supra*, at p. 887 & fn. 4, citing *People v. Posey* (2004) 32 Cal.4th 193, 218; accord, *People v. Fleming*, *supra*, at p. 765.)

C. Analysis

1. Forfeiture

Defendant did not object to the court's proposed response to the jury's question in this case and, to the contrary, he affirmatively agreed. As a result, his claim of error on appeal is forfeited. (*People v. Harris* (2008) 43 Cal.4th 1269, 1317; *People v. Roldan* (2005) 35 Cal.4th 646, 729, disapproved in part on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We nevertheless find any error harmless.

2. Source of Error

Defendant characterizes the error as an instruction to the jury on an invalid legal theory. We disagree. As previously stated, defendant was charged with one count of oral copulation between March 16, 2011, and December 31, 2011, and, based on our review of the record, it appears the prosecutor anticipated the possibility of evidence of multiple acts of oral copulation. Specifically, during the preliminary hearing, Officer Kobashi testified that in Doe's statement to police, she said defendant forced her to orally copulate him approximately 10 times, with the first incident occurring in 2011. Accordingly, the trial court instructed the jury on unanimity, as is required in such instances, and when the jury had a question during deliberations, the trial court reread the unanimity instruction attached to counts 1 through 28, count 185 and count 186. The jury's confusion, however, arose because Doe testified to an act of oral copulation that occurred in 2010 rather than 2011.

As we have explained, a unanimity instruction serves to protect the right to a unanimous jury by ensuring the jury agrees on the defendant's guilt as to a specific crime. It is not, as we interpret defendant's argument to imply, a legal theory of criminal liability to which the jury was misdirected. (See *People v. Guiton*, *supra*, 4 Cal.4th at p. 1125 [a legally invalid theory, for example, "fails to come within the statutory definition of the crime"]; accord, *People v. Perez* (2005) 35 Cal.4th 1219, 1233.) Nor do we agree that the court was required to read CALCRIM No. 207, which applies where a specific date is alleged.

Here, the jury agreed unanimously that defendant committed an act of copulation by means of force, violence, duress, menace or fear, but it was confused by the variance between Doe's testimony that it occurred in 2010 and the charge identifying the time period was 2011. At its core, defendant's argument is that the court's response to the jury's question did not target the source of confusion; that is, it misdirected the jury. Even assuming error, however, there was no harm.

3. Any Error Harmless

"'"[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated" in [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836 (*Watson*)].'" (*People v. Beltran* (2013) 56 Cal.4th 935, 955; accord, *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 919.) "In general, a trial court's failure to adequately answer a jury's question during deliberations is subject to prejudice analysis under … *Watson*[, *supra*, at p.] 836." (*People v. Fleming*, *supra*, 27 Cal.App.5th at p. 768, citing *People v. Roberts* (1992) 2 Cal.4th 271, 326; accord, *People v. Lua* (2017) 10 Cal.App.5th 1004, 1017.) This "'requires us to evaluate whether the defendant has demonstrated that it is "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'"'" (*People v. Fleming*, *supra*, at p. 768, quoting *People v. Gonzalez* (2018) 5 Cal.5th 186, 195; accord, *People v.*

Lua, *supra*, at p. 1017, citing *People v. Roberts*, *supra*, at p. 326.) Several well settled principles apply here to resolve defendant's claim of prejudice against him.

First, "[t]he precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." (§ 955.) Second, so long as defendant had notice of the charges against him and an adequate opportunity to defend against those charges, which he unquestionably did in this case, only a material variance between the information and the evidence adduced at trial is of concern. (*People v. Williams* (1945) 27 Cal.2d 220, 225–226 ["[I]t is elementary that every fact or circumstance necessary to constitute the crime charged must be alleged and proved, and the proof must correspond with the allegations in the pleading. But technical or trifling matters of discrepancy will not furnish ground for reversal. Under the generally accepted rule in criminal law a variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense."]; accord, *People v. Amperano* (2011) 199 Cal.App.4th 336, 343; see § 960 ["No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."].) Finally, to the extent it is necessary, the trial court has the discretion under section 1009 to amend the information to conform to proof at trial, so long as there is no prejudice to the defendant. (*People v. Fernandez*, *supra*, 216 Cal.App.4th at p. 554, citing *People v. Jones*, *supra*, 51 Cal.3d at p. 317 ["Due process requires that a criminal defendant be advised of the charges against him so that he has a reasonable opportunity to prepare and present a defense and not be taken by surprise by evidence offered against him at trial."].)

Here, defendant fails to demonstrate that the variance at issue was material. Although he contends that but for the court's response, it is reasonably probable he would

not have been convicted of oral copulation, this assertion is belied by the record. The jury was merely confused over the variance between the date range alleged—2011—and Doe's testimony that the act occurred in 2010. To the extent that the court's response to the jury was inadequate because it did not target the source of their confusion, the response simply did not "result[] in a reasonable probability of a less favorable outcome." (*People v. Lua*, *supra*, 10 Cal.App.5th at p. 1017.) The jury had already decided that defendant committed the act of oral copulation charged and neither its question nor the court's response had any bearing on that factual determination.

IV. Limitation of Doe's Cross-examination

A. Background

Next, defendant claims that the trial court violated his Sixth Amendment right to cross-examine witnesses against him when it sustained the prosecutor's objections to his inquiry into Doe's immigration status and whether anyone promised her assistance with her legal status. He argues that if Doe received immigration assistance based on her status as a crime victim, "she arguably had an incentive to falsely accuse [him], and the jury had the right to infer that she accused him to obtain her legal status."[15] Defendant contends the error was prejudicial because Doe was the only prosecution witness to testify about the crimes and "excluding [his] suspicious confession," the prosecution's case "was not overwhelming."

The People respond that defendant's failure to object at trial forfeits his claim, but, regardless, his claim is speculative given the lack of a record on the issue and any arguable error was harmless.[16] In supplemental briefing, defendant concedes his failure

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15 Victims of certain crimes may apply for a "U visa," which is a "temporary nonimmigrant visa created by Congress to provide legal status for noncitizens who assist in the investigation of serious crimes in which they have been victimized." (*People v. Morales* (2018) 25 Cal.App.5th 502, 506, citing 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14(b) (2019).)

16 To the extent the People's argument suggests that defendant was required to make an offer of proof in the trial court, we note that after briefing was complete in this case, the

to object during trial forfeited his claim and he argues trial counsel rendered ineffective assistance of counsel.

B. Legal Standard

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, [citation], 'means more than being allowed to confront the witness physically.' [Citation.] Indeed, '"[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*."' [Citations.] Of particular relevance here, '[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678–679.) "'"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors … could appropriately draw inferences relating to the reliability of the witness.'" [Citation.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth

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California Supreme Court overruled prior cases that suggested an offer of proof was required to appeal the limitation of cross-examination, on the basis that those cases are inconsistent with Evidence Code section 354, subdivision (c). (*People v. Hardy* (2018) 5 Cal.5th 56, 103–104.)

Amendment. [Citation.]'" (*People v. Linton* (2013) 56 Cal.4th 1146, 1188; accord, *People v. Williams* (2016) 1 Cal.5th 1166, 1192.)

C. Analysis

1. Forfeiture

Defendant did not object to the trial court's ruling, which, as he concedes, results in forfeiture of his claim. (*People v. Lucas* (2014) 60 Cal.4th 153, 330, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; accord, *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19.) However, we need not reach defendant's derivative ineffective assistance of counsel claim because we conclude the limitation at issue did not violate the Sixth Amendment. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7 [appellate courts have discretion to review forfeited claims]; *People v. Baker* (2018) 20 Cal.App.5th 711, 720 [reaching merits of claim to show counsel was not ineffective]; *People v. Lua, supra,* 10 Cal.App.5th at p. 1014 [reaching merits of claim to forestall ineffective assistance of counsel claim]; cf. *People v. Riel* (2000) 22 Cal.4th 1153, 1202 [a defendant "cannot automatically obtain merit review of a noncognizable issue by talismanically asserting ineffective assistance of counsel."].)

2. No Sixth Amendment Violation

The issue of Doe's immigration status was raised by defendant during cross-examination, as follows:

> "[DEFENSE COUNSEL:] [Doe], as to your legal status, you came here from the—you came to the United States from Mexico in 2006?
>
> "[DOE:] I came illegally.
>
> "[DEFENSE COUNSEL:] Do you have legal status now?
>
> "[PROSECUTOR]: Objection. Irrelevant.
>
> "THE COURT: Sustained.
>
> "[DEFENSE COUNSEL]: Okay. Okay. Has anybody from the D.A.'s Office told you that they would assist you in obtaining legal status?

"[DOE:] Yes. Well I had a therapist and she made a comment to me.

"[DEFENSE COUNSEL:] That based on these acts that your father did to you that you could obtain legal status?

"[PROSECUTOR]: Objection. Irrelevant.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: No further questions, Your Honor."

Evidence must be relevant to be admissible (Evid. Code, § 350), and "'[r]elevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210). In this case, the issue of Doe's immigration status was not the subject of a motion in limine and there is no indication in the record that she applied for a U visa.

Doe testified that her therapist made a comment to her about obtaining legal status. The timing of this comment is not discernible from the record, but the evidence shows that H.M. was the first person Doe told about the sexual abuse, and she reported the crimes shortly thereafter. In addition, the investigator for the district attorney's office, with whom Doe discussed her notebook, testified that she did not inquire into Doe's immigration status. Thus, defendant's assertion that Doe may have been motivated to falsely accuse him to obtain legal status is based on pure conjecture, which does not suffice to demonstrate that the court erred in excluding relevant evidence. (*People v. Hardy, supra*, 5 Cal.5th at p. 87 [trial court has broad discretion to determine relevance of evidence]; *People v. Kopatz* (2015) 61 Cal.4th 62, 85 [trial court's ruling on admission or exclusion of evidence reviewed for abuse of discretion].)

Moreover, even if we assume the trial court should have permitted further inquiry into this area, the error did not rise to the level of a Sixth Amendment violation. As explained above, "[a] trial court's limitation on cross-examination pertaining to the

credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623–624; accord, *People v. Linton*, *supra*, 56 Cal.4th at p. 1188.) Such was not the case here.

As defendant recognizes, "credibility is usually the 'true issue' in these cases, [and] 'the jury either will believe the [victim's] testimony that the consistent, repetitive pattern of acts occurred or disbelieve it.'" (*People v. Jones*, *supra*, 51 Cal.3d at p. 322.) Defendant challenges the strength of the prosecution's case, but Doe was a 16-year-old high school student when the abuse began and nothing in the record suggests that her testimony regarding the abuse was equivocal or otherwise reflected negatively on her credibility. As well, H.M. testified that defendant sent Doe an inappropriate love song, and during the pretextual phone calls, Doe questioned defendant about having sexual relations with her. Defendant agreed it was wrong for fathers to have sex with their daughters, but he blamed Doe for allowing him to have sex with her. Although defendant was evasive during both phone calls, his responses, clearly made in the context of questions regarding sexual contact between them, are inconsistent with a claim that Doe falsely accused him of the crimes in this case. Furthermore, in his statement to police, defendant admitted to having sex with Doe two to three times a week, but, consistent with the pretextual phone calls, blamed her for initiating the contact despite acknowledging that she was a minor when the sexual contact began.

Defendant asserts that his confession "deserves little credence" due to the audiotape malfunction and he excludes it from his calculus. The jury was instructed, pursuant to CALCRIM No. 358, to "[c]onsider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." However, the statements were nevertheless evidence to be considered by the jury and defendant is not entitled to have them excluded from consideration on review.

In addition, defense counsel cross-examined Doe regarding her failure to report the abuse until 2013, despite having regular contact with her mother and friendships at school, and despite living with relatives in close quarters during some periods of abuse, including one period during which Doe and defendant slept in the living room of a one-bedroom residence. Under these circumstances, it is speculative that further exploration into Doe's legal status as a crime victim would have led to additional impeachment evidence of value and we do not agree with defendant that had counsel been permitted to do so, a reasonable jury might have been left with a "significantly different impression of [Doe's] credibility." (*People v. Quartermain, supra,* 16 Cal.4th at p. 624.) We therefore reject defendant's confrontation clause claim.

V. Sentencing Claim

A. Forfeiture

Finally, defendant challenges his sentence of 1,503 years as excessive under the federal and state Constitutions. Correctly anticipating the People's argument that he forfeited this claim by failing to object in the trial court, defendant contends that claims of purely legal error should be reached even in the absence of an objection and that, to forestall a claim of ineffective assistance of counsel, reviewing courts have reached such challenges even in the absence of an objection.

"As a general rule, 'complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.'" (*People v. Baker, supra,* 20 Cal.App.5th at p. 720, quoting *People v. Scott* (1994) 9 Cal.4th 331, 356.) "A claim that a sentence is cruel or unusual requires a 'fact specific' inquiry and is forfeited if not raised below." (*People v. Baker, supra,* at p. 720, quoting *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; accord, *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247–1248.) Accordingly, we reject defendant's claim to the contrary. Nevertheless, because we conclude that defendant's claim lacks merit, we exercise our discretion to resolve it on that ground. (*In re Sheena K., supra,* 40 Cal.4th at

p. 887, fn. 7; *People v. Baker*, *supra*, at p. 720; *People v. Lua*, *supra*, 10 Cal.App.5th at p. 1014; cf. *People v. Riel*, *supra*, 22 Cal.4th at p. 1202.)

B. Legal Standard

"The Eighth Amendment to the United States Constitution applies to the states. (*People v. Caballero* (2012) 55 Cal.4th 262, 265, fn. 1.) It prohibits the infliction of 'cruel *and* unusual' punishment. (U.S. Const., 8th Amend., italics added.) Article I, section 17 of the California Constitution prohibits infliction of '[c]ruel *or* unusual' punishment. (Italics added.) The distinction in wording is 'purposeful and substantive rather than merely semantic. [Citations.]' (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) As a result, we construe the state constitutional provision 'separately from its counterpart in the federal Constitution. [Citation.]' (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) This does not make a difference from an analytic perspective, however (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fn. 7), … [citations]. The touchstone in each is gross disproportionality. (See *Ewing v. California* (2003) 538 U.S. 11, 21 (lead opn. of O'Connor, J.); *Rummel v. Estelle* (1980) 445 U.S. 263, 271; *People v. Dillon* (1983) 34 Cal.3d 441, 479.) Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82; accord, *People v. Baker*, *supra*, 20 Cal.App.5th at pp. 723, 733.)

C. Analysis

"Outside the death penalty context, '"successful challenges to the proportionality of particular sentences have been exceedingly rare."' [Citations.] There is no question that 'the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts."' [Citation.] It is for this reason that when faced with an allegation that a particular sentence amounts to cruel and unusual punishment, '[r]eviewing courts … should grant substantial deference to the broad authority that legislatures necessarily

possess in determining the types and limits of punishments for crimes ….'" (*People v. Reyes* (2016) 246 Cal.App.4th 62, 83.) Thus, "'[o]nly in the "exceedingly rare" and "extreme" case' will a sentence be grossly disproportionate to the crime." (*People v. Baker, supra*, 20 Cal.App.5th at p. 732; accord, *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1221.)

This is not such a case. Defendant's severe sentence is the result of his conviction for 185 counts of rape and one count of oral copulation. While it is unquestionably lengthy, the sentence reflects defendant's acts of repeated rape committed against his daughter over the course of four years. Defendant relies in part on Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, 600–601 (conc. opn. of Mosk, J.) for the proposition that a sentence as lengthy as that imposed here "serves no rational legislative purpose," but that concurring opinion has no precedential value. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231, citing *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.) Nor is defendant's reference to the sea change in the law relating to juvenile offenders of any assistance. (See, e.g., *Miller v. Alabama* (2012) 567 U.S. 460; *Graham v. Florida* (2010) 560 U.S. 48; *Roper v. Simmons* (2005) 543 U.S. 551; *People v. Contreras* (2018) 4 Cal.5th 349; *People v. Franklin* (2016) 63 Cal.4th 261; *People v. Caballero* (2012) 55 Cal.4th 262.) Defendant was in his 30's when he committed the crimes, and not a juvenile or a youth offender, as he acknowledges. (See § 3051 [subject to certain exceptions, providing for youth offender parole hearings for those 25 years of age or younger].)

As previously stated, defendant bears the burden of demonstrating error on appeal and although he challenges his sentence as unconstitutionally excessive, he cites to no controlling or persuasive authority so holding on similar facts. Defendant was sentenced pursuant to section 667.6, subdivision (d), which required the trial court to impose

mandatory consecutive sentences on all counts.[17] Although defendant does not challenge section 667.6, we observe that the statute was upheld against a constitutional challenge by the Court of Appeal in *People v. Preciado* (1981) 116 Cal.App.3d 409, 412–413. The court explained, "Here [the defendant] committed multiple violent rapes. By requiring a full, separate, and consecutive term for each rape, … section 667.6 subdivision (d) attempts to 'provide increased punishment in cases of greater culpability based upon injury to the victims and society.' (*People v. Hughes*, 112 Cal.App.3d 452, 462.) The severity of [the defendant's] sentence is directly proportionate to the number and violence of his crimes. Mandatory imposition of consecutive sentences for multiple violent rapes does not constitute cruel and unusual punishment." (*Id.* at p. 412; accord, *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 528–532.)

The prosecutor in this case estimated that at twice a week for four years, defendant raped Doe more than 400 times, but defendant was charged with and convicted of 186 sex offenses. Given that defendant's lengthy sentence is directly related to the number of sex crimes he committed against Doe by means of force, violence, duress, menace or fear, we decline his invitation to find his sentence grossly disproportionate to his crimes. (*People v. Baker*, *supra*, 20 Cal.App.5th at p. 732.)

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17 Section 667.6 was amended effective January 1, 2019, to reflect the renumbering of section 288a to section 287. (Sen. Bill No. 1494 (Reg. Sess. 2017-2018) ch. 423, § 67.)

DISPOSITION

The judgment is affirmed.

_____
MEEHAN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
FRANSON, J.